UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD[1]

REGION 20

AIRTEX AIR CONDITIONING
AND HEATING, INC.

Employer,

Case 20-RC-18277

and

SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL 162

Petitioner

REPORT AND RECOMMENDATIONS REGARDING CHALLENGED BALLOTS AND OBJECTIONS

Pursuant to a petition filed by the Petitioner on December 2, 2009, the Regional Director approved the parties' Stipulated Election Agreement in this matter on December 17, 2009. As provided for by that Agreement, a Board agent (Agent) conducted an election by secret ballot on January 13, 2010[2] among the employees in the following appropriate collective bargaining unit:[3]

> Including: All full-time and regular part-time Installers employed by the Employer at its facility located at 3199 Fitzgerald Road, Rancho Cordova, California.
>
> Excluding: All other employees, Guards, and Supervisors as defined in the Act.

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[1] Also referred to as Board.
[2] All dates hereinafter refer to 2010 unless otherwise indicated.
[3] As the Employer is engaged in the construction industry, the Election Agreement additionally defined eligibility to vote in a manner consistent with the *Daniel/Steiny* formula. *See Daniel Construction Co.*, 133 NLRB 264 (1961), modified at 167 NLRB 1078 (1967); *Steiny & Co.*, 308 NLRB 1323 (1992).

The election took place at the Employer's warehouse/shop, located at 3199 Fitzgerald Road in Rancho Cordova, California, during polling sessions from 6:30 a.m. to 7:30 a.m. and 4 p.m. to 4:45 p.m.

Upon the conclusion of the election, the Agent served a copy of the official *Tally of Ballots* on the parties. The *Tally* showed the following results:

Approximate number of eligible voters	14
Void ballots	0
Votes cast for participating labor organization	5
Votes cast against participating labor organization	3
Valid votes counted	8
Challenged ballots	5
Valid votes counted plus challenged ballots	13

The challenged ballots are sufficient in number to affect the election results.

On January 19, the Employer and the Petitioner each timely filed *Objections*, a copy of which was served on each respective opposing party. Acting pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, I directed an investigation of the challenged ballots and the respective *Objections,* and report and recommend as follows:

THE CHALLENGED BALLOTS

The Board challenged three voters—**Steve Bonick**, **Thomas Avalos** and **Ben Allen**—on the ground that their names did not appear on the eligibility list. Petitioner challenged two other voters, **Ben Juarez** and **Steve Fisher**, on the ground that each was allegedly a supervisory employee.

Steve Bonick and **Thomas Avalos**: Petitioner, as Charging Party, alleged in Case 20-CA-34749 that the Employer violated Section 8(a)(3) of the National Labor Relations Act by terminating Messrs. Bonick and Avalos on November 5, 2009. On January 26, I dismissed those allegations and, by letter dated March 5, the Office of Appeals upheld my dismissal. Accordingly, Bonick and Avalos were ineligible to vote because they were no longer bargaining unit employees at the time of the election, and I recommend that the Board sustain the challenges to the ballots that they cast.

Ben Allen: The Employer submitted evidence, including a separation letter and time cards, demonstrating that Allen quit his employment with the Employer as of October 12, 2009. Specifically, the evidence showed that Allen was a "no call no show" for work on October 8 and 9, 2009. The Employer's Owner, Nitin Patel, provided testimony that, on October 12, 2009, Allen phoned the Employer and informed Office Manager and Safety Coordinator Heather Atkins that he was quitting and returning to work for a prior employer. Allen's time cards confirm that he was not at work during the pertinent period, and the Employer's October 12 separation letter to Allen confirms that it believed that he had resigned. Testimony further showed that Allen's unexcused absences prior to his resignation would preclude his rehire if Allen were to seek it. Attempts to contact Allen, both directly and through Petitioner, proved unsuccessful, and the evidence as to Allen's resignation stands uncontradicted. As the investigation showed that Allen ended his employment in the bargaining unit prior to the date of the election, and that Allen had no reasonable expectation of rehire with the Employer, I recommend that the Board sustain the challenge to his ballot.

Ben Juarez: Juarez's supervisory status was initially put into issue by the above-noted charge in Case 20-CA-34749. The investigation of that charge, as supplemented by post-election investigation, revealed that Juarez is not a supervisor within the meaning of Section 2(11) of the Act. In particular, affidavit, sworn and documentary evidence demonstrated that Juarez served the Employer as a nonsupervisory leadman or foreman.

Juarez is designated as a "Lead Installer" by the Employer. Most employees refer to him as a "foreman." He works alongside employees on construction installation projects. As detailed below, he also has a role in directing other employees' work.

The evidence showed that Juarez has no authority to hire, transfer, suspend, lay-off, recall, promote, or reward employees. Evidence as to his disciplinary powers is lacking. Although some employees referred to Juarez's ability to "discipline" them, the investigation showed that by such references they meant that he had authority to assign work tasks and to correct work errors. There is no evidence that he issued written warnings, or that his oral denunciations or directives have had any impact on any

employee's disciplinary record. Although Juarez was involved in the process to terminate then-employees Bonick and Avalos, he was a reporter rather than a decision maker. In fact, the investigation established that Owner Patel and Project Manager Garth Ervin jointly made the decision to terminate the two. Evidence that Juarez informed employees that they had no safety harnesses and that they would get none merely conveyed the Employer's policy, and did not demonstrate authority to adjust grievances.[4] Finally, the evidence fails to demonstrate that Juarez had authority to grant time off. One employee believed that Juarez once granted him a day off, but Patel and Juarez supplied sworn declarations denying that Juarez exercised such authority. Several other employees' affidavits indicate that Ervin handled all scheduling. While it thus appears that Juarez may have taken the liberty to allow an employee to take a day off, occasional isolated instances of actions that might otherwise indicate supervisorial powers will not suffice to establish that status. *Volair Contractors*, 341 NLRB 673 (2004); *Kanawha Stone Co*., 334 NLRB 235 (2001). Evidence also showed that Juarez did not receive a premium for serving as lead installer, and that he worked side-by-side with the other installers.

It is undisputed that Juarez did carry a company phone and that he directed employees' work on the job site. The evidence did not show, however, that Juarez had authority to assign and/or responsibly to direct employees. As the Board has explained regarding the first of those elements,

> [t]he authority to 'assign' refers to 'the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee …(and) not to the … ad hoc instruction that the employee perform a discrete task.'

Croft Metals, Inc., 348 NLRB 717, 721 (2006) (quoting *Oakwood Healthcare, Inc.,* 348 NLRB 686, 689 (2006)).

[4] Indeed, evidence shows that the Employer later provided harnesses to its employees, contradicting Juarez's statement and suggesting that Juarez was not privy to the Employer's policy making processes.

With regard to the second element, the Board observed that,

> The authority 'responsibly to direct' . . . arises '[i]f a person on the shop floor has 'men under him,' and if that person decides 'what job shall be undertaken next or who shall do it,' … provided that the direction is both 'responsible' … and carried out with independent judgment."

Id. (quoting *Oakwood Healthcare, Inc.*, 348 NLRB at 691). "Responsible" direction arises if the alleged supervisor is held accountable for the actions of his underlings. *Id.*

"'[T]o exercise 'independent judgment,' an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.'" *Id.* (quoting *Oakwood Healthcare, Inc.*, 348 NLRB at 692-93). To explain the concept of independent judgment vis-à-vis the authority to assign, the Board stated that

> [t]he authority to effect an assignment … must be independent [free of the control of others], it must involve a judgment [forming an opinion or evaluation by discerning and comparing data], and the judgment must involve a degree of discretion that rises above the 'routine or clerical.'"

Id. (quoting *Oakwood Healthcare, Inc.*, 348 NLRB at 693).

First, I conclude that Juarez did not have the ability independently to "assign" workers. The evidence establishes that Juarez had the ability merely to assign the workers to various job tasks and reassign them as needed. The assignments, however, constituted "ad hoc instruction [to] perform a discrete task" rather than the "designation of significant overall duties."

All the employees working with Juarez were engaged in the same basic tasks—installing air conditioning and heating systems in a particular area of the building. When a need arose to install some duct work here, or to repair some duct work there, Juarez would assign employees as appropriate. In contrast, Project Manager Ervin had authority to reassign employees to work at other sites or to cover service and maintenance work orders. Juarez's ad hoc and discrete direction fell short of

constituting true "assignment" authority. *See Croft Metals, Inc.*, 348 NLRB at 721-22 (authority occasionally to reassign work tasks "to finish projects or achieve production goals" found more "ad hoc" in nature, and not true "assignment"); *CGLM, Inc.*, 350 NLRB 974, 984 (2007) (when a warehouse "manager" "direct[ed] that one employee assist another if assistance was necessary," and otherwise redirected assignments from time to time, no true authority to "assign" existed). In any event, and for the same reasons discussed, the assignments did not rise above the "routine" authority typical of leadmen. Compare *North Jersey Newspaper Co.*, 322 NLRB 394, 395 (1996) (routine rotation of employees to differing tasks; reassignment of an employee to atypical tasks when for example, a person was out sick; and reassignment of employees from one machine to another in view of need constituted "routine" leadman tasks) with *Birmingham Fabricating Co.*, 140 NLRB 640, 642 (1963) ("leadermen" disciplined employees on his shift, granted time off and furloughed employees in slack periods).

Second, I conclude that Juarez did not exhibit "independent judgment" in directing employees.[5] As explained above, the Employer's employees were typically engaged in the installation of air conditioning and heating systems in a particular area of a construction site. Juarez did assign the employees to perform needed installations around the building. If a task were botched, he would shift employees to correct the situation. The evidence thus demonstrates that Juarez instructed employees as to what tasks to perform, when, and how. Juarez, however, had no say in who was scheduled to work with him. Nor did Juarez have any authority to make changes to the Employer's activities or project schedule. Rather than targeting specific production-oriented goals, Juarez simply monitored day-to-day installation tasks.

This evidence does not establish that Juarez exercised "'significant discretion and judgment in directing' others." *Oakwood Healthcare, Inc.*, 348 NLRB at 692 n.38. Rather, Juarez's direction was of the routine, "common sense"-type "typical of a nonsupervisory leadman." *See North Jersey Newspaper Co.*, 322 NLRB at 395; *cf. Croft Metals*, 348 NLRB at 722 (leadmen made independent decisions regarding the

[5] There is no evidence that Juarez was in any way held accountable for the adequacy of the workers under him, i.e., that he "responsibly" directed the employees.

order of work and assignment of work tasks so as to achieve management-targeted production goals); *McClatchy Newspapers*, 307 NLRB 773, 779 (1992) (press operators responsibly assigned and directed work where, *inter alia*, they assigned apprentices to work with journeyman based on "the abilities of the employees, job priorities, and Respondent's production and efficiency requirements," and had independent authority to stop the presses, with serious implications for management and employees alike).

In my opinion, the evidence fails to demonstrate that Juarez was anything more than a nonsupervisory foreman and leadman. Because Juarez was not a supervisor within the meaning of Section 2(11) of the Act, and because he otherwise met the eligibility criteria set out in the Stipulated Election Agreement, I recommend that the Board overrule Petitioner's challenge to his ballot.

Steve Fisher: Evidence revealed that Fisher also lacked sufficient authority to be classified as a supervisor pursuant to Section 2(11) of the Act. According to his own affidavit, Fisher's title with the Employer was "Service Technician."[6] He performed some installation work on construction sites but, more typically, was assigned to handle service and maintenance work on prior-installed systems. There is no evidence that Fisher had authority to hire, transfer, suspend or otherwise discipline, lay-off, recall, promote, discharge, or reward employees. Nor is there any evidence that that he had authority to grant employees time off or otherwise adjust their grievances. There is evidence that from time to time, Fisher needed assistance on a residential service or maintenance project. In such circumstances, on his own initiative Project Manager Ervin assigned an employee to help Fisher, or Fisher asked for help. Either way, Ervin determined whether to make such an assignment and whom to assign. An employee who worked with Fisher on service and maintenance jobs stated that he typically learned about such assignments from Ervin though, on occasion, Fisher called him directly and informed him about the change in assignment. The fact that he sometimes

[6] Fisher no longer works for the Employer. He gave his two-week notice to resign from the Employer on January 11. He was still working for the Employer at the time of the election, however, and the declaration of his intent to resign prior the election is no bar to his voting eligibility. *See Sisters of Mercy Health Corp.*, 298 NLRB 483, 485 (1990); *see also Roy Lotspeich Pub. Co.*, 204 NLRB 517 (1973).

directly informed the assistant about the assignment, however, does not belie Fisher's testimony that he lacked authority to make such a decision.

There is evidence that Fisher nominally directed the work of employees who worked with him on service and maintenance jobs.[7] According to one employee, Fisher informed him about what tasks to do and the order in which to do them. Fisher acknowledged as much, adding that is was his responsibility to ensure that the work was done correctly.[8] But Fisher also stated that he often utilized the employees for less skilled tasks, thus necessitating little direction. When the employee had enough experience to perform more complex work, Fisher would simply direct him to the troubled part of the system and allow the employee to perform the work independently. The evidence does not establish that Fisher exercised "'significant discretion and judgment in directing' others." *Oakwood Healthcare, Inc.*, 348 NLRB at 692 n.38. At most, Fisher's direction was of the routine, "common sense"-type "typical of a nonsupervisory leadman." *See North Jersey Newspaper Co.*, 322 NLRB at 395.

There is a modicum of evidence of secondary indicia that suggests that Fisher enjoyed atypical employee status. It is undisputed that he drove a company truck. Other employees confirm that only Project Manager Ervin (and possibly Office Manager and Safety Coordinator Atkins and owner Patel) had access to those vehicles. Fisher used a company phone, while most other employees did not. He carried a purchase order book, and had authority to order parts directly. According to one employee, only Fisher, Patel, Ervin and Atkins had such discretion. There is also some evidence to suggest that Fisher dealt directly with service and maintenance customers.[9] Assuming

[7] Fisher states that, from time to time, he would be assigned to work as a Lead Installer on a construction site. He explains that, because he could at any time be called away for a service job, he only performed Lead Installer work on small sites with experienced apprentices. He states that he directed employees only insofar as he would show the apprentices the construction plans and explain generally what they needed to do. There is no evidence that his oversight role exceeded that.

[8] Fisher stated that he was unsure whether the Employer would have held him responsible for the failures of other employees' work on service jobs.

[9] One employee claims that Fisher received customer calls on his company phone and made out his own service schedule. In his affidavit, Fisher asserts that he received no direct calls from customers. Rather, customer calls were filtered through Office Manager Atkins. Assuming that Fisher did deal directly with customers to schedule service calls, the evidence nevertheless shows that Ervin scheduled employee

all this is true, secondary indicia do not suffice to demonstrate an employee's supervisory status, particularly when Fisher's duties as the sole Service Technician, subject at any time to a summons to make a service call, seem to account for the differences that existed between him and other employees *See In re Training School at Vineland*, 332 NLRB 1412 n.3 (2000). In short, the distinctions seem to have derived from his unique duties, but those duties were neither supervisory nor managerial.

In my opinion, the evidence fails to demonstrate that Fisher was anything more than a nonsupervisory leadman. Because Fisher was not a supervisor within the meaning of Section 2(11) of the Act, and because he otherwise met the eligibility criteria set out in the Stipulated Election Agreement, I recommend that the Board overrule Petitioner's challenge to his ballot.

THE OBJECTIONS

The Employer's Objections: The Employer's *Objections*, in support of which it submitted a timely offer of proof, read verbatim as follows:

> Objection No. 1 – Sheet Metal Workers Local 162 ("the Union") campaigned during the 24 hours preceding the election.
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> Objection No. 2 – The Union gave captive audience speeches to Airtex employees during the final 24 hours prior to the election.
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> Objection No. 3 – The Union campaigned and gave a captive audience speech to Airtex employees on the day of the election at a time when the polls were open.
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> Objection No. 4 – The Union, within 24 hours prior to the election, distributed a '"ballot" to Airtex employees which improperly attempted to deceive the recipient into believing it was a "ballot" distributed by the National Labor Relations Board and marked "Yes."

Assuming the veracity of the claims made in the Employer's offer of proof, I find that the objections lack merit for the reasons below.

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assignments and schedules and that Fisher's receipt of direct calls would constitute, at most, another secondary indicium.

Objection No. 1: The Petitioner campaigned during the 24 hours preceding the election.

According to the employer's offer of proof, the facts that support Objection No. 1 (and also Objection No. 2) are as follows:

> The polls opened at 6:30 a.m. on Wednesday, January 13, 2010. Mr. Saelee and Mr. Sallee will state as follows: Just prior to 12:00 noon on Tuesday, January 12, 2010, Glenn Snyder, an organizer for Sheet Metal Workers Local 162 ("the Union") visited Airtex employees including Saelee and Sallee during work time while the employees were performing work on the Bloodsource Medical Office Building jobsite. At this time, Mr. Snyder, who was known and recognized by Airtex employees as a representative of Local 162, approached employees, including Kao Saelee and Shawn Sallee, and handed each of them a flyer, one of which is attached hereto as Exhibit 1, and said to them, "Local 162 wants you to vote 'yes'."
>
> Airtex employee Ian Edmondson will state as follows: At approximately 10:30 a.m. to 11:00 a.m. on Tuesday, January 12, Glenn Snyder of Local 162 approached Edmondson while Edmondson was working at the Aerojet GET L-A Treatment project. He approached Mr. Edmondson during work time while Mr. Edmondson was on a ladder performing work. He ignored Edmondson's statements that he was working and efforts by Edmondson to continue working and spoke to him for approximately 20 minutes, and gave him a copy of the same flyer attached hereto as Exhibit 1.[10] Mr. Edmondson was the only Airtex employee on the Aerojet site.
>
> Mr. Snyder returned to the Aerojet site accompanied by an unemployed Union sheet metal worker named "Matt", on Wednesday, January 13 (the day of the election) at approximately 10:30 a.m. Again during Mr. Edmondson's work time, Mr. Snyder said the "yes" votes outnumbered the "no" votes and inquired of Mr. Edmondson whether Airtex employee Emerson Cesa had voted.[11]

[10] A copy of the flyer is attached to this Report and Recommendation.
[11] Snyder gave an affidavit in the matter. He admitted to visiting the Bloodsource and Aerojet sites on January 12. He states that he waited until employees were filing out for lunch to hand them his flyer. He likewise admitted to speaking with Edmonson and to giving him a flyer. For purposes of this Report, however, I credit the Employer's statement of the facts in its entirety.

The Employer has cited no cases or rules of law—and I know of none—that bar parties' otherwise lawful "campaigning" within 24 hours of a representation election. *See*, *e.g.*, *Setzer's Super Stores, Inc.*, 123 NLRB 1051, 1054 (1959) (distinguishing the *Peerless Plywood* rule from election-day electioneering). Accordingly, I recommend that the Board overrule Employer's Objection No. 1.

Objection No. 2: The Petitioner gave captive audience speeches to Airtex employees during the final 24 hours prior to the election.

The allegations supporting this objection are produced verbatim under the section dedicated to Objection No. 1, above. Even if true, the allegations do not make out objectionable conduct.

The Board has long held that both parties to an election are prohibited from giving captive audience speeches to employee-voters during the 24 hours prior to an election. *See Peerless Plywood Company*, 107 NLRB 427 (1953). In particular, the Board barred employers and unions from "making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election." *Id.* at 429. The Board was particularly concerned that "[s]uch a speech, because of its timing, tends to create a mass psychology which overrides arguments made through other campaign media…." *Id.* The Board distinguishes campaigning that does not involve a massed assembly. When, for example, the president of the company spoke about the vote individually to at least half of the eligible voters at their work stations on the day of the election, the Board found no *Peerless* violation. According to the Board, no speech to a mass of employees occurred, thus precluding the kind of "mass psychology" the *Peerless* rule is concerned with. *Electro-Wire Products, Inc.*, 242 NLRB 960 (1979); *see also Associated Milk Producers, Inc.*, 237 NLRB 879 (1978) (finding no *Peerless* violation under similar facts).

Nor does the *Peerless* rule bar posters or the distribution of other campaign literature. *See Peerless Plywood Company*, 107 NLRB at 430 ("This rule will not interfere with the rights of unions or employers to circulate campaign literature on or off the premises at any time prior to an election, nor will it prohibit the use of any other legitimate campaign propaganda or media."); *see also Andel Jewelry Corporation*, 326

NLRB 507 (1998) (employer distributed a campaign leaflet and answered follow-up questions within the 24-hour period, no *Peerless* violation).

In view of the cited authority, the Employer's Objection No. 2 fails. Snyder's distribution of literature to employees at their work stations on the Bloodsource Medical Office Building jobsite on January 12 did not constitute a prohibited speech. That Snyder told each employee "Local 162 wants you to vote 'yes'" does not change the result. Likewise, Snyder's encounters with Edmonson on January 12 and 13 involved a lone employee and could not have created the kind of "mass psychology" the *Peerless* rule is meant to prevent. Accordingly, I recommend that the Board overrule Employer's Objection No. 2.

Objection No. 3: The Petitioner campaigned and gave a captive audience speech to Airtex employees on the day of the election at a time when the polls were open.

To the extent that Objection No. 3 overlaps the first two Objections, I have addressed it above. What remains constitutes a challenge to the Petitioner's election-day conduct as objectionable electioneering. This objection also fails.

Election-day electioneering is not per se objectionable. To determine whether electioneering activities undermined the laboratory conditions necessary for a free and fair election, the Board considers: the nature and extent of the electioneering; whether it was conducted by a party to the election or by employees; whether it was conducted in a designated "no electioneering" area; and whether it was contrary to the instructions of the Board agent. *See Boston Insulated Wire & Cable Co.*, 259 NLRB 1118, 1118-19 (1982) *enfd.* 703 F.2d 876 (5th Cir. 1983).

Here, the record is silent as to whether the Agent designated a particular no-electioneering area. The Employer did not advance any evidence that a specific area was so designated. In the absence of a designation, "the area 'at or near the polls' is the area for which the Board applies strict rules against electioneering." *Bally's Park Place, Inc.*, 265 NLRB 703 (1982) (citing *Milchem, Inc.*, 170 NLRB 362 (1968); *Claussen Baking Company*, 134 NLRB 111 (1964)). Indeed, the Notice of Election in this case instructs that "Electioneering will not be permitted at or near the polling place."

The Employer alleges that Petitioner's agent, Snyder, visited the Aerojet site and spoke to Edmonson at approximately 10:30 a.m. on the day of the election. Snyder admits to having visited the Aerojet site between the morning and afternoon polling sessions and speaking to Edmonson. The electioneering complained of by the Employer thus occurred nowhere near the polling area,[12] and took place between polling sessions. The electioneering was limited in nature, involving a conversation with only one employee. Finally, it seems unlikely, and there is no evidence whatsoever, that the Agent issued any instructions covering conduct that might occur away from the Employer's facility between the polling sessions. Thus, it cannot be said that this campaigning violated the Agent's instructions.[13]

For the reasons discussed, I recommend that the Board overrule Employer's Objection No. 3.

Objection No. 4: The Petitioner, within 24 hours prior to the election, distributed an altered and deceptive "ballot" to Airtex employees.

It is undisputed that Snyder distributed the flyer in question to the Employer's employees on January 12. It is also undisputed that the flyer was created by altering the sample ballot contained on the Board's Notice of Election. For reference, the flyer is attached to this Report and Recommendation. For the reasons discussed below, however, Employer's Objection No. 4 lacks merit.

The framework for analysis of an altered sample ballot consists of a two-pronged test.

[12] The Aerojet site is in Carmichael, CA, which MapQuest places as more than eight miles from the Employer's address.

[13] Nor does the substance of the conversation change the outcome. That Snyder orally inquired as to whether Edmonson knew if employee Emerson Cesa had voted does not amount to the compilation or maintenance of a list of voters--activity that the Board has found objectionable. *See*, *e.g.*, *Piggly-Wiggly #11 and #228 Eagle Food Centers, Inc.*, 168 NLRB 792 (1967) (union agents stationed 4 to 6 feet in front of the employer's two stores holding a list of eligible voters, and noted on list which employees entered during the voting period). The conversation occurred far from the polling area, and there is no evidence that Snyder wrote anything down. On the contrary, the comment suggests that Snyder had no record of who had voted.

> First, if the source of an altered sample ballot is clearly identifiable on the face of the ballot, then the Board will find the distribution of the document not objectionable because 'employees would know that the document emanated from a party, not the Board, and thus would not be led to believe that the party has been endorsed by the Board.'….If, however…the source of the altered sample ballot at issue is not clearly identifiable on its face…'it becomes necessary to examine the nature and contents of the material in order to determine whether the document has the tendency to mislead employees into believing that the Board favors one party's cause.'

Service Corp. Int'l d/b/a Oak Hill Funeral Home and Memorial Park, 345 NLRB 532, 534 (quoting *SDC Investment, Inc.*, 274 NLRB 556, 557 (1985)).

When a reasonable employee would view the document as an obvious copy marked by a party for campaign purposes, the flyer is not misleading. *Id.* (citing *Worths Stores Corp.*, 281 NLRB 1191, 1193 (1986)). Extrinsic evidence, such as the manner of distribution and proper posting of the Board's standard form Notice of Election, may also be considered. *Id.*

The flyer at issue is mostly a reproduction of the sample ballot as shown on the Board's Notice of Election. Below the identification of the petitioning party on the ballot, the phrase "Want You to Vote Yes!" appears. This information and positioning alone served to identify the source of the document as the Petitioner.

Even if this information and positioning do not clearly identify the source, the flyer and pertinent extrinsic evidence demonstrate that the reasonable employee was not misled into thinking that the flyer was generated by the Board or that the Board favored the Petitioner. First, the flyer is clearly a marked duplication of another document. The ballot is type-written, excepting for the hand-written phrase "Want You to Vote Yes!". There is a large black "X" written over the "Yes" box. Moreover, Snyder kept on the flyer the following explanation concerning marked sample ballots included on the standard form Notice of Election: "The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample

ballot have not been put there by the National Labor Relations Board." The Employer's Affidavit of Posting establishes that four Notices of Election bearing this message were posted in and around the Employer's facility on January 7. Moreover, the evidence shows that Snyder was the only person to have passed out the flyer. As the Employer admits, Snyder "was known and recognized by Airtex employees as a representative of Local 162."

In light of all the evidence, I conclude that a reasonable employee would not have been misled by the flyer into believing that the Board favored the Petitioner. To the contrary, a reasonable employee would have viewed the flyer as an obvious piece of election propaganda issued by Petitioner. *See*, *e.g.*, *Service Corp. Int'l d/b/a Oak Hill Funeral Home and Memorial Park*, 345 NLRB at 533-34. Accordingly, I recommend that the Board overrule Employer's Objection No. 4.

The Petitioner's Objections: Petitioner's *Objections*, in support of which it submitted a timely offer of proof, read verbatim as follows:

> Objection No. 1 – The Employer, through its supervisors and agents, held a captive audience meeting with employees on the morning of the election.
>
> Objection No. 2 – During the voting period, the Employer appointed Heather Atkins, a person closely identified with management, to act as its observer.

Objection No. 1: The Employer held a captive audience meeting with employees on the morning of the election.

It is undisputed that Heather Atkins, Office Manager and Safety Coordinator, held a meeting with the Employer's employees immediately following the first polling session on January 13. In her own affidavit, Atkins describes the meeting as the yearly "company meeting" at which time she passed around an agenda consisting mostly of rules and policies the employees should remember to follow. Atkins supplied the written agenda that she used at the meeting. The agenda contains no mention of the election.

According to Atkins, one employee raised a question about the election, inquiring about the voting process. She answered that there would be two voting sessions, that

employees would vote, and that they should know whether the union won or not immediately following the second polling session—unless challenged ballots would make a difference to the outcome of the election. She states that this unsolicited question-answer exchange constituted the only discussion about the Petitioner or the election.

Two employees provided affidavit evidence about the meeting. One recalled that some of the employees discussed the election, but that Atkins did not. The other employee recalled Lead Installer Ben Juarez asking Atkins why his vote had been challenged, and why he had to write his name on the challenged ballot. According to the employee, Atkins resisted answering the questions, stating that they should not discuss the election. Juarez pressed her, however, and Atkins briefly explained that if his vote had to be counted, the Board agent would drop his ballot in with the rest of the votes. The employee recalls the exchange being very brief, and that the remainder of the session concerned other work-related topics. Given the testimony, it seems clear that one employee asked a question concerning the mechanics of the election to which Atkins responded briefly.

Even if Atkins functioned at the time of the meeting as an agent of the Employer, the meeting and conversation did not constitute objectionable conduct under *Peerless Plywood*. In *Andel Jewelry Corporation*, 326 NLRB at 507, for example, the employer distributed leaflets to employees and answered questions as they arose. The Board agreed with the hearing officer's determination that the answering of individuals' questions did not rise to the level of objectionable speech-giving under the *Peerless* rule. *Cf. Montgomery Ward & Co., Inc. (Alton, Ill.)*, 124 NLRB 343, 344 (1959) (question and answer session violated the *Peerless* rule, where the meeting was arranged by the employer to give the employees information concerning the desirability of selecting a bargaining representative, and where responses to questions indicated its opposition to employee organization); *Honeywell, Inc.*, 162 NLRB 323 (1966) (violation where employer solicited questions and issued anti-organizational responses for over an hour); *Mallory, P. R. & Co., Inc., Mallory Capacitor Co. Div.*, 167 NLRB 647 (1967) (employer

went beyond stated intent to inform employees that the election would be held as scheduled and expressed its anti-organizational views).

There is no evidence that the purpose of the meeting was to campaign or discuss the election. Atkins solicited no questions regarding the election, and only briefly answered the single question posed. The question regarded the mechanics of the election. In answering, Atkins in no way indicated a pro- or anti-organizational message. This simply did not constitute the kind of election-related speech forbidden by *Peerless Plywood* and its progeny. Accordingly, I recommend that the Board overrule Petitioner's Objection No. 1.

Objection No. 2: The Employer appointed Heather Atkins, a person closely identified with management, to act as its observer to the election.

There is no dispute that Heather Atkins, Office Manager and Safety Coordinator, served as the Employer's election observer during both polling sessions. Affidavit evidence establishes that the Petitioner objected to the Employer's choice of Atkins during the pre-election conference, thus preserving the issue. The Petitioner objects to the use of Atkins as an observer, claiming she is closely identified with management. The investigation confirms that employees could (and mostly did) reasonably view Atkins as closely identified with management. Because the use of Atkins as an observer interfered with the laboratory conditions necessary to conduct the election, I believe that Petitioner's Objection No. 2 has merit.

"It is established Board policy that persons closely identified with management may not act as employer observers." *BCW, Inc.*, 304 NLRB 780, 781 (citing *Peabody Engineering Co.*, 95 NLRB 952, 953 (1951)). The question of whether a person is closely identified with management is fact-intensive, focusing on the person's duties and interactions with management and employees alike. *See id.* at 780-81; *see also VJNH, Inc.*, 328 NLRB 87, 102 (1999) (listing nine areas of pertinent inquiry). Evidence that co-workers considered the person as management, and that the person monitored employees or otherwise served in a quasi-agency capacity for the employer, is particularly telling. *See BCW, Inc.*, 304 NLRB at 780-81.

According to Atkins' affidavit, she works in the employer's business office and reports directly to Owner Nitin Patel. She has worked for the Employer since June 2005. Only she and Patel work day-to-day in the office. Since about January, Atkins has had her own office. Before that time, her work station was located at the front counter in the lobby of the office, a spot now vacant. From her current office, Atkins can see if someone enters, and she retains the responsibility to greet such persons. In addition, Atkins answers the phones, sends and receives faxes, and opens the company's mail.

Atkins works with Patel to coordinate accounts payable and receivable and the generation and approval of purchase orders. Atkins prepares payroll tax forms and other aspects of the payroll for the company. According to her affidavit, employees regularly call her to report their hours, or drop off or fax their time cards to her. In this way, she deals directly with employees regarding the payroll. Patel thereafter approves or denies the hours for each employee, and she cuts and mails checks based on Patel's review. With Patel's approval, Atkins prepares workman's compensation forms and payments and 401(k) payments for prevailing wage jobs. Atkins acknowledges that many of these forms bear her signature, but insists that they are all approved in advance by Patel.

Atkins maintains and retains all employee personnel records in her office, and retrieves records from them when Patel or an employee asks. In addition, she prepares and files disciplinary forms for the employees. Atkins explains that the Employer has no standard disciplinary form, and that when Patel or Ervin informs her of a disciplinary issue, she asks him to put it in writing or prepares a note herself, which she then files. Upon instruction from Patel, Atkins also prepares a standard separation form and a final check when an employee quits or is terminated. Typically, Patel then conducts an exit interview with the employee and provides him with his final check.

Atkins will hand out employment applications forms, but has no role in interviewing or determining whom to hire. Once someone is hired, she creates a personnel file for the employee and enters the employee's payroll-related information into the company's computer system. Although Atkins does not appear to give new

employees their orientation packet, she usually goes over the forms and information with each new hire to ensure that he completes all forms and to answer any questions. Atkins has no role in setting wage scales.

Atkins also leads employee and company meetings from time to time. Despite her title as Safety Coordinator, she has only led approximately four safety meetings during her time with the Employer. The safety meetings are held at the various job sites, and typically happen on a weekly basis. When she has led such meetings, she took with her a memorandum about a particular safety subject, read it to the employees, and fielded any questions.[14]

Atkins has also led annual company meetings to remind employees about Employer rules and policies. As discussed above with regard to Petitioner Objection No. 1, one such meeting was held on the morning of the January 13 election. According to Atkins, she brings an agenda to such meetings and addresses the employees. Project Manager Ervin also typically attends, with owner Patel "running in and out." Only Patel makes material changes to the annual agenda. The agenda of the January 13 meeting included reminders to employees to "clean up your messes;" to give three days notice for materials that they wished to order; to call her everyday "beginning and end;" to include start and stop times on all timecards; and included instruction on how to call out sick. Although she leads these annual meetings, and usually responds to any questions or concerns that employees raise, Atkins states that one of the reasons she does so is because Patel has a fairly strong accent and she is easier to understand.

Finally, it is undisputed that Atkins spoke on behalf of the Employer at a company-held dinner on January 8, the Friday just prior to the election. According to Atkins herself, the dinner was held in part to provide information to employees regarding the upcoming representational election. Patel did not attend the meeting but, according to Atkins, he informed her beforehand that he "wanted me to let [the employees] know that he wanted Airtex to remain non-union." Affidavit evidence from employees

[14] For all such meetings, she chooses the week's topic by referring to the Employer's former workman's compensation insurer's website, which contains memoranda on safety meetings.

confirms that Atkins relayed Patel's message.[15] The evidence establishes that Atkins was the only Employer representative to address employees, that her remarks were brief, and that she paid for the dinner on behalf of the Employer.

Consistent with the reference in the agenda for the January 13 company meeting, two employees testified that employees have to call into the Employer's office every day when they arrive at work, and call in again when they leave. Atkins will often be the person who answers the phone. According to one employee, if one forgets to report, Atkins will "usually" call to remind him of the policy, though on occasion Patel performs that task. There is evidence that Atkins told employees that Patel had told her to let employees know that they would "get a day off" if they repeatedly failed to call in.[16]

Other evidence shows that Atkins holds a key to and accesses the Employer's tool room. She makes copies of keys for the employee tool boxes used in the field. Most paperwork the employees have to supply to the Employer, including documents regarding child support payments, is routed through Atkins. Atkins has been seen driving a company truck—including on the morning of the election.

In response to Petitioner's Objections, owner Patel submitted a sworn declaration addressing in some detail Atkins' role with the Employer. In his submission, Patel refers to Atkins as an "office assistant"—despite the fact that in prior affidavits he referred to her as his office manager.[17] Patel asserts that Atkins has no role in hiring, firing, disciplining, or terminating employees, and does not oversee their work. He confirms her role in handling the various office tasks and acknowledges that she "prepares payroll for my review and authorization." According to Patel, she is not authorized to adjust employees' grievances, or respond to issues raised by contractors. Atkins's hours were recently reduced to 32 hours per week; she is a non-exempt employee paid $22.50 per hour. She is actually paid less than some field employees, and is provided

[15] One employee did not recall Atkins saying anything about the election, but several others provided testimony corroborating Atkins' own recollection.
[16] There is no evidence that the Employer has acted upon this warning and meted out discipline for such a failure.
[17] Snyder offered a copy of what purports to be the "Airtex Employee Phone List" dated June 23, 2009. It too labels Atkins as "Office Manager."

the same health insurance benefit. Atkins does not attend "management meetings" and does not participate in creating company policy or strategy.

Patel claims to have scheduled the company dinner initially to discuss the union election, but later determined to make the event purely social. He gave Atkins money to pay for the dinner. Patel states that Atkins was not authorized to speak for the Employer on union issues, yet admits that he asked Atkins to tell employees that he (Patel) wanted Airtex to remain nonunion. She was to instruct employees to direct all related questions to him. Patel himself addressed the employees regarding the election at a special meeting on January 11—a meeting not attended by Atkins. Patel states that he asked Atkins to handle the annual meeting held on January 13 because he did not want to give the appearance that he was campaigning. Patel confirms that the annual meetings are of a routine nature; that the agenda remains the same from year-to-year; and that attendance is not enforced through tests or discipline.

Based on the extensive investigation, I conclude that employees could (and did) reasonably view Atkins as being closely aligned with management. It is uncontroverted that employees phoned in their weekly hours to Atkins; typically phoned in their daily in and out-times to Atkins; attended meetings at which Atkins instructed them about company policies and procedures; and attended safety meetings that Atkins conducted. The evidence also establishes that employees received reminders from Atkins regarding the need to call in and out, accompanied by threats of discipline for failure to comply. Most regarded Atkins as the "Office Manager." It is undisputed that she worked directly with Patel; helped orient new hires; had access to tools that other employees did not; and had access to personnel files and other confidential employee information. Perhaps most importantly, it is undisputed that Atkins addressed the employees at the company dinner on the Friday before the election and, pursuant to Patel's instruction, conveyed Patel's desire that the Employer remain nonunion. Atkins was clearly speaking on behalf of the Employer, and a reasonable employee would have so concluded.

Much of the information provided by Patel goes to supervisory or managerial status; these questions are not at issue. A person need not be a supervisor or manager

to be closely identified with management. *See BCW, Inc.*, 304 NLRB at 780. Like the person at issue in *BCW, Inc.*, Atkins led employee meetings, had her own office, had access to sensitive employee information, utilized the company trucks, and monitored employees to some degree. Beyond that, Atkins conveyed to employees the Employer's position regarding the representational election. As such, Atkins "had been placed by management in a strategic position where employees could reasonably believe [that s]he spoke on its behalf." *B-P Custom Bldg. Products*, 251 NLRB 1337, 1338 (1980) (citing *Samuel Liefer and Harry Ostreicher, a copartnership, d/b/a River Manor Health Related Facility*, 224 NLRB 227, 235 (1976) *enfd.* 559 F.2d 1204 (2d Cir. 1977).

The case cited by Employer's counsel, *Southland Frozen Foods*, 282 NLRB 769 (1987), is distinguishable. The person at issue in *Southland* worked alongside unit employees 75% of the time; gave only routine instruction to employees; and conveyed routine assignment-related information from management to employees. The Board concluded that, unlike the person at issue in *B-P Custom Bldg. Products*, employees could not reasonably construe her as speaking on behalf of or for management. *Id.* at 770. The various meetings that Atkins led; her oversight of employees' daily work time and weekly payroll recording; her access to confidential employee information; and her advocacy that employees vote against union representation at the Employer's campaign dinner are factors that differentiate her materially from the employee at issue in *Southland*. In short, having provided Atkins with the hat of Office Manager and Safety Coordinator--and, in particular, having tasked her to pay for and campaign against Petitioner at an employee dinner several days in advance of the election--the Employer was not at liberty to have Atkins wear its observer's hat at the election.

Accordingly, I recommend that the Board sustain Petitioner's Objection No. 2.

SUMMARY

In my judgment, the administrative investigation resolved all the issues raised by the challenged ballots and respective *Objections*. For the reasons set forth above, I recommend that the Board sustain the challenges to the ballots cast by Bonick, Avalos

and Allen, and overrule the challenges to the ballots cast by Juarez and Fisher. Further, I recommend that the Board overrule all of the Employer's Objections and Petitioner's Objection No. 1. Finally, I recommend that the Board sustain Petitioner's Objection No. 2, and set aside the election and direct that it be rerun in the event that the ultimate *Revised Tally of Ballots* shows that Petitioner did not receive a majority of the valid votes counted.

DATED AT San Francisco, California, this 30th day of March 2010. [18]

/s/ *Joseph P. Norelli*
Joseph P. Norelli, Regional Director
National Labor Relations Board, Region 20
901 Market Street, Suite 400
San Francisco, California 94103

Attachment

[18] Under the provisions of Section 102.69 and 102.67 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington, D.C. within 14 days. Exceptions thus must be received by the Board by April 13, 2010. Under the provisions of Section 102.69(g) of the Board's Rules and Regulations, documentary evidence, including declarations, which a party has timely submitted to the Regional Director in support of its objections and which is not included in the Report, is not part of the record before the Board unless appended to the exceptions or opposition thereto which the party files with the Board. Failure to append to the submission to the Board copies of the evidence timely submitted to the Regional Director and not included in the Report shall preclude the party from relying on that evidence in any subsequent related unfair labor practice proceeding.

AIRTEX AIR CONDITIONING AND HEATING, INC.

Do you wish to be represented for purposes of collective bargaining by-

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 162

Want You to Vote Yes!

MARK AN "X" IN THE SQUARE OF YOUR CHOICE

YES	NO
X	☐

DO NOT SIGN THIS BALLOT. Fold and drop in ballot box.
If you spoil this ballot return it to the Board Agent for a new one.

The National Labor Relations Board does not endorse any choice in this electio Any markings that you may see on any sample ballot have not been put there by National Labor Relations Board.

Attachment